

**RITCHIE v ADVANCED PLUMBING AND DRAINS PTY LTD (2017/126664)**

**OUTLINE OF SUBMISSION IN SUPPORT OF MOTION TO PROCEED AGAINST  
INSURANCE AUSTRALIA LIMITED**

**A. INTRODUCTION**

1. In this proceeding, the Plaintiff claims damages (for herself and on behalf of group members) for loss suffered as a result of a bushfire negligently started by Advanced Plumbing and Drains Pty Ltd (**Advanced**). Advanced is in liquidation and its insurer, Insurance Australia Limited t/a CGU Insurance (**CGU**), has denied indemnity.
2. By Notice of Motion dated 12 April 2018, the Plaintiff seeks leave to proceed against CGU pursuant to s.5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (**Third Party Claims Act**) as a defendant to this proceeding.
3. The principal issue for determination is whether there is an arguable case that, pursuant to the policy of insurance,<sup>1</sup> CGU is liable to indemnify Advanced for the claims made in this proceeding.
4. The Plaintiffs rely on:
  - 4.1 the affidavit of Brendan Pendergast sworn on 30 January 2018 and its exhibit BFP-1 (**Pendergast Affidavit**);
  - 4.2 the affidavit of Kathryn Emeny sworn on 12 April 2018 and its exhibit KAE-1 (**Emeny Affidavit**); and
  - 4.3 the expert report of Dale Rankin dated 1 June 2018 (**Rankin Report**).
5. Reference will also be made to the contents of CGU's tender bundle filed on 13 July 2018 (**Respondent Bundle**), consisting primarily of police interviews with employees of Advanced in relation to the circumstances of the fire to which the representative proceeding relates.

**B. SUMMARY CONTENTIONS**

6. The Plaintiff submits that she ought to be granted leave to proceed against CGU to recover Advanced's insured liability in respect of the fire for the following reasons:
  - 6.1 the motion is a valid application under s 4(1) of the Third Party Claims Act;
  - 6.2 she has an arguable case against Advanced;

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<sup>1</sup> The Policy is at KAE-1 p. 19-34 and the Policy Schedule at KAE-1 p.12-18.

6.3 there is an arguable case that the Policy responds to that liability despite CGU's disclaimer of liability; and

6.4 it is certain that if judgment is obtained Advanced will be unable to meet it.

## C. RELEVANT FACTS

### C.1. Nature of claims in representative proceeding

7. On 28 April 2017, the Plaintiff commenced a representative proceeding under Part 10 of the *Civil Procedure Act 2005* against Advanced. By her statement of claim,<sup>2</sup> the Plaintiff alleges that on 17 February 2017, Advanced was performing works at 78 Brindabella Place, Carwoola (**Property**).<sup>3</sup> She alleges that Advanced ought to have known that using a power cutting wheel to cut steel would cause the discharge of sparks with the potential to ignite a fire.<sup>4</sup> She alleges that in the circumstances Advanced owed the Plaintiff and Group Members a duty to take reasonable care to reduce the likelihood of a fire eventuating if such works were being undertaken.<sup>5</sup> She alleges that the circumstances on 17 February 2017 included that a total fire ban had been declared for the area.<sup>6</sup>

8. The Plaintiff alleges that employees of Advanced carried out such cutting work which did in fact lead to a bushfire.<sup>7</sup> She alleges that this occurred in breach of Advanced's duty of care and that Advanced is liable for the resulting damage to the property and person of the Plaintiff and Group Members.<sup>8</sup>

9. A defence to the statement of claim was filed on 1 September 2017.<sup>9</sup> The defence pleads, relevantly, that:

9.1 a fire started at the Property on 17 February 2017 at around 11 or 11:30 am;<sup>10</sup>

9.2 a Husqvarna K970 II Rescue was used to cut 3-bar 6mm steel mesh on 17 February 2016 at the Property;<sup>11</sup>

9.3 Advanced was aware that the act of cutting steel with a Husqvarna K970 II Rescue would produce sparks;<sup>12</sup>

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<sup>2</sup> BFP-1, pp 21-34.

<sup>3</sup> BFP-1, p 23, [6].

<sup>4</sup> BFP-1, pp 23-4, [8]-[9].

<sup>5</sup> BFP-1, p 24, [12].

<sup>6</sup> BFP-1, p 25, [13(b)].

<sup>7</sup> BFP-1, p 23, [14].

<sup>8</sup> BFP-1, pp 25-7, [15]-[21].

<sup>9</sup> BFP-1, pp 36-45.

<sup>10</sup> BFP-1, p 37, [1(a)].

<sup>11</sup> BFP-1, p 38, [6].

<sup>12</sup> BFP-1, p 38, [8].

- 9.4 reasonable precautions were taken to identify, assess and manage fire risk associated with use of the Husqvarna K970 II Rescue;<sup>13</sup>
- 9.5 on 17 February 2016, work at the Property was supervised by an experienced employee of Advanced, Mr Orford;<sup>14</sup>
- 9.6 Mr Orford operated the Husqvarna K970 II Rescue ensuring that there was a minimum clearance of 15m of clear earth and that sparks were directed towards the foundations of the Property.<sup>15</sup>

## C.2. Criminal proceedings

10. In July 2017, criminal proceedings were commenced against Mr Orford and Mr Harrison William Elliot, the persons who had been engaged in cutting steel around the time of the fire.
11. Mr Orford told police that Mr Hooper had instructed him to attend the Property on Thursday, 16 February 2017 to “*get all the meshes for the footings...sorted out*”.<sup>16</sup> (Mr Hooper (the director of Advanced)<sup>17</sup> and his wife were joint owners of the Property at the relevant time.<sup>18</sup>) The “*meshes*” was a reference to steel trench reinforcing mesh.<sup>19</sup> The meshes were cut to length where necessary using a cordless grinder or a quick cut (“*a concrete saw with a steel blade*”).<sup>20</sup> Cutting was done on an area free of vegetation.<sup>21</sup>
12. Mr Orford attended the Property again the following morning, Friday, 17 February 2017.<sup>22</sup> Mr Elliot, an apprentice, was also at the Property and was assisting Mr Orford install mesh.<sup>23</sup> During the course of the work, Mr Orford made some cuts to the mesh on-site to fit the retaining wall at the rear of the property.<sup>24</sup> He said he used a grinder to “*notch out a couple of little bits*”<sup>25</sup> and used the quick cut to make the “*big cuts where I had to cut trench mesh*”.<sup>26</sup> While facing the house, he heard a crackle and turned to see flames behind him.<sup>27</sup>

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<sup>13</sup> BFP-1, p 40, [16].

<sup>14</sup> BFP-1, p 41, [16] particular (b); p 42, [23(b)].

<sup>15</sup> BFP-1, p 41, [16] particular (e).

<sup>16</sup> Respondent Bundle, p 4, Q42-43.

<sup>17</sup> BFP-1, p 10.

<sup>18</sup> Respondent Bundle, p 52.

<sup>19</sup> Respondent Bundle, p 6, Q67-68.

<sup>20</sup> Respondent Bundle, p 7, Q77-78.

<sup>21</sup> Respondent Bundle, p 8, Q80-82.

<sup>22</sup> Respondent Bundle, p 8, Q87-89.

<sup>23</sup> Respondent Bundle, p 9, Q94-100; p 10, Q104; p 11, Q162 – p 12 Q172.

<sup>24</sup> Respondent Bundle, p 12, Q174; p 14, Q194-198

<sup>25</sup> Respondent Bundle, p 15, Q202.

<sup>26</sup> Respondent Bundle, p 16, Q216-219.

<sup>27</sup> Respondent Bundle, p 15, Q204-208.

13. In a second interview, Mr Orford clarified that Mr Elliot had been cutting the mesh at the time of the fire.<sup>28</sup> Mr Elliot had been cutting so that sparks were emitted over a distance of some metres into the trench where Mr Orford was working.<sup>29</sup> Mr Orford *“hollered at him to turn around.”* He said that in his experience, the distance and direction of sparks when cutting metal depended upon *“how you’re using the saw”*.<sup>30</sup>
14. Mr Elliot gave a statement to police consistent with Mr Orford’s first version.<sup>31</sup> In his statement, he said that he had not used a quick cut before and that, *“Only someone with experience should use it.”*<sup>32</sup> He said that it was his first day on site and that there was an inspection scheduled for that afternoon.<sup>33</sup> He later participated in a recorded interview in which he accepted that he had been the one cutting at the relevant time:
- “A: And I was shooting the sparks um, at the trench obviously. And um, he basically yelled out, don't shoot sparks at me. Turn around. And ah, so I did. Um, without thinking because we were in a rush.
- Q109: Yeah.
- A: And yeah and made the cut again. And - - -
- Q111: And from where, there and then what happened from there, where did you go to cut, the cut?
- A: Um, cut it. Put the quick saw down. Grabbed the two bits of steel that I cut. Pulled them over. Um, put them in the trench. Got in the trench. Lifted them up. Tied them in. Turned around the same time as Shannon. Looked and saw flames.”
15. Mr Elliot confirmed, consistently with his earlier version, that he had not operated the quick cut before.<sup>34</sup> He indicated his and Mr Orford’s position at the time of the fire by reference to an overhead view of the Property showing the spread of the fire.<sup>35</sup>
16. On 15 December 2017 in Queanbeyan Local Court, Mr Orford and Mr Elliot pleaded guilty to failing to follow a total fire ban under s 99(6) of the *Rural Fires Act 1997*.<sup>36</sup> They were sentenced on the basis that the decision to turn the quick cut away from the trench had caused sparks to be directed into grass where they started the fire.<sup>37</sup>

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<sup>28</sup> Respondent Bundle, p 22, Q79.

<sup>29</sup> Respondent Bundle, p 23, Q80; p 24, Q96.

<sup>30</sup> Respondent Bundle, p 25, Q103-Q110.

<sup>31</sup> Respondent Bundle, p 26.

<sup>32</sup> Respondent Bundle, p 26, [5].

<sup>33</sup> Respondent Bundle, p 27, [6].

<sup>34</sup> Respondent Bundle, p 42, Q116.

<sup>35</sup> Respondent Bundle, p 49.

<sup>36</sup> Pendergast Affidavit, [14]; BFP-1, p 49

<sup>37</sup> BFP-1, p 52.

### C.3. Liquidation and s 500 application

17. On 19 December 2017, Advanced went into voluntary liquidation.<sup>38</sup> The effect of s 500 of the *Corporations Act 2001* (Cth) (**Corporations Act**) was to stay the proceedings against Advanced, subject only to a grant of leave.
18. The Initial Advice to Creditors dated 3 January 2018 confirmed that Advanced had limited assets available for creditors.<sup>39</sup> The liquidator confirmed to the Plaintiff's solicitors that, at the time of the fire, Advanced held a public liability policy issued by CGU but declined to provide a copy voluntarily.<sup>40</sup>
19. On 30 January 2017, the Plaintiff brought an application in the Equity Division of the Supreme Court seeking leave to proceed against Advanced pursuant to s 500(2) of the Corporations Act, supported by the Pendergast Affidavit (**Section 500 Application**).

### C.4. Insurance Policy

20. On 14 February 2018, in response to a notice to produce, the liquidator produced a copy of a "general and products liability" policy for the period 29 March 2016 to 29 March 2017 (**Policy**). The Policy comprised a Policy Schedule (10M6756278) and Policy Wording (Vertex GPL 0713).<sup>41</sup> Advanced was the named insured and CGU the named insurer.
21. The Schedule indicated coverage was in respect of, relevantly, injury and property damage with a policy limit ("Limit of Liability") of \$20 million. The indemnity clause in the Policy Wording is (cl 1):

"1. The Indemnity

Coverage: In consideration of the Named Insured having paid or agreed to pay the Premium and subject to the terms, Definitions, Exclusions, Conditions, provisions and Limit of Liability set out in this Policy, the Insurer will indemnify the Insured against the legal liability of the Insured to pay:

1.1 Compensation in respect of:

- 1.1.1 Injury to any person;
- 1.1.2 Property Damage;
- 1.1.3 Advertising Injury;

occurring within the Geographical Limits during the Period of Insurance as a result of an Occurrence happening in connection with the Insured's Business or Products."

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<sup>38</sup> Pendergast Affidavit, [5].

<sup>39</sup> BFP-1, p 76.

<sup>40</sup> Pendergast Affidavit, [18].

<sup>41</sup> Emeny Affidavit, [10]-[11]; KAE-1, p 12.

22. The Business is defined in the Schedule as, “*Principally: Plumbing and any other activities incidental thereto*”. The Business is further defined in cl 4.4.5 of the Wording as including, “*private work undertaken by the Insured’s Employees for any director...of the Insured.*” Clause 4.7 defines “Employee” as “*any person under a contract of service or apprenticeship with the Insured.*” Clause 4.15 defines “Occurrence” as “*an event...which results in Injury to any person, Property Damage or Advertising Injury where such Injury, Property Damage or Advertising Injury is neither expected nor intending from the standpoint of the Insured*”. Coverage was worldwide, with the exception of the United States and Canada.
23. The Schedule includes a welding endorsement (**Welding Endorsement**), which provides:<sup>42</sup>
- “WELDING ENDORSEMENT
- The liability of the Insurer to indemnify the Insured pursuant to Clause 1.1 and to pay other costs and expenses pursuant to Clause 1.2 shall not extend to any liability arising out of or in any way connected with any arc or flame cutting, flame heating, arc or gas welding, electric, oxy-acetylene, laser cutting and/or spark producing equipment by or on behalf of the Insured or similar operation in which welding equipment is used, unless such activity is conducted in strict compliance with the:
1. Australian Standard AS 1674, Part 1 – 1997 ‘Safety in Welding and Allied Processes – Fire Precautions’ issued by the Standards Association of Australia
  2. AS 1674.2 – Safety in Welding and Allied Processes – Part 2: Electrical, and/or
  3. AS/NZS 2211.1:2004 Safety of laser products – Equipment classification, requirements and user’s guide”.
24. Australian Standard AS 1674, Part 1 – 1997 “Safety in Welding and Allied Processes – Fire Precautions” (**AS 1674.1**)<sup>43</sup> “*specifies precautions to be taken prior to and during hot work (including welding and allied processes), to prevent the possibility of fire or explosion, which may result in harm to persons or property*” (cl 1.1.).<sup>44</sup> It adds a note of general application to its description of scope: “*Although primarily oriented to hot work that is related to welding and allied processes, this Standard can generally be applied to other forms of ignition sources in hazardous areas.*”<sup>45</sup> Clause 3 outlines a procedure for authorising and monitoring the performance of hot works in hazardous areas. Clause 5 relates to fire protection precautions that may be taken while hot works are carried out.
25. Clause 1.3.3 of AS 1674.1 defines “hot work” as “*grinding, welding, thermal or oxygen cutting or heating, and other related heat-producing or spark-producing operations.*”<sup>46</sup> Clause

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<sup>42</sup> KAE-1, p 13.

<sup>43</sup> KAE-1, p 40.

<sup>44</sup> KAE-1, p 43.

<sup>45</sup> KAE-1, p 43.

<sup>46</sup> KAE-1, p 45.

4.4 elaborates, “GRINDING MACHINES: Work that includes the use of grinding machines driven by either electric power or compressed air shall be regarded as hot work within the meaning of this Standard”.

26. AS 1674.2 – Safety in Welding and Allied Processes – Part 2: Electrical (**AS 1674.2**)<sup>47</sup> is not of general application. It “sets out safety requirements for arc welding and allied processes, to reduce the possibility of electric shock and minimize associated hazards” (cl 1.1).<sup>48</sup> It does not refer to hot works and “allied process” is defined to mean “An electric arc process that is not used for joining, such as air arc gouging, air arc cutting, metal arc cutting, arc spraying and plasma spraying” (cl 1.3.1).<sup>49</sup>
27. AS/NZS 2211.1:2004 Safety of laser products – Equipment classification, requirements and user’s guide has not been exhibited. It is self-evidently irrelevant.

#### C.5. Denial of cover

28. The hearing of the Section 500 Application was adjourned to 21 March 2018 as a decision from CGU on coverage in respect of the fire was pending.<sup>50</sup> The Plaintiff’s solicitors were informed on 20 March 2018 that CGU had denied coverage. CGU’s denial letter to Advanced dated 16 March 2018 relies on two bases for the denial:<sup>51</sup>
- 28.1 that the cutting of steel with a power cutting wheel had not occurred in connection with the Business because it was private work for Mr Hooper and not related to plumbing work (**Business Ground**); and/or
- 28.2 that the Welding Endorsement applied and that the cutting had not been in strict compliance with AS 1674.1 (**Welding Ground**).
29. On 21 March, Registrar Walton joined CGU to the substantive proceedings (2017/126664), stayed the Section 500 Application (2018/31598) until further order, and transferred both to the Common Law Division.<sup>52</sup> The Plaintiff subsequently filed a notice of motion seeking leave to proceed against CGU pursuant to s 5 of the Third Party Claims Act and ancillary relief, supported by the Emeny Affidavit (**Leave Motion**).

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<sup>47</sup> KAE-1, p 65.

<sup>48</sup> KAE-1, p 70.

<sup>49</sup> KAE-1, p 71.

<sup>50</sup> Emeny Affidavit, [7].

<sup>51</sup> KAE-1, p 114.

<sup>52</sup> KAE-1, p 118.

## D. PRINCIPLES

### D.1. Third Party Claims Act

30. The Third Party Claims Act is a legislative regime designed to replace s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* but preserve its beneficial object in allowing plaintiffs to access the insurance of defendants.<sup>53</sup> It does this by providing an ability to bring proceedings directly against an insurer in respect of an insured liability. This is balanced by a requirement that leave be granted so as “to insulate insurers from exposure to untenable claims”.<sup>54</sup>

31. The Act relevantly provides:

#### “3 Definitions

(1) In this Act:

*claimant*—see section 4.

*court* means a court or tribunal of New South Wales.

*insured liability* means a liability in respect of which an insured person is entitled to be indemnified by the insurer.

*insured person* means a person who is, in respect of a liability to a third party, entitled to indemnity pursuant to the terms of a contract of insurance, and includes a person who is not a party to the contract of insurance but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends.

*liability* means a liability to pay damages, compensation or costs.

...

#### 4 Claimant may recover from insurer in certain circumstances

- (1) If an insured person has an insured liability to a person (the *claimant*), the claimant may, subject to this Act, recover the amount of the insured liability from the insurer in proceedings before a court.
- (2) The amount of the insured liability is the amount of indemnity (if any) payable pursuant to the terms of the contract of insurance in respect of the insured person’s liability to the claimant.
- (3) In proceedings brought by a claimant against an insurer under this section, the insurer stands in the place of the insured person as if the proceedings were proceedings to recover damages, compensation or costs from the insured person. Accordingly (but subject to this Act), the parties have the same rights

<sup>53</sup> See New South Wales Law Reform Commission Report 143 (November 2016) (NSWLRC 143).

<sup>54</sup> *Murphy, McCarthy & Associates Pty Limited v Zurich Australian Insurance Limited* [2018] NSWSC 627 at [16] (Hammerschlag J).

and liabilities, and the court has the same powers, as if the proceedings were proceedings brought against the insured person.

- (4) This section does not entitle a claimant to recover any amount from a re-insurer under a contract or arrangement for re-insurance.

**5 Leave to proceed**

- (1) Proceedings may not be brought, or continued, against an insurer under section 4 except by leave of the court in which the proceedings are to be, or have been, commenced.
- (2) An application for leave may be made before or after proceedings under section 4 have been commenced.
- (3) Subject to subsection (4), the court may grant or refuse the claimant's application for leave.
- (4) Leave must be refused if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law."

32. In *Mrdajl v Southern Cross Constructions (NSW) Pty Ltd (In Liq)* [2018] NSWSC 161, Walton J considered the construction of sections 4 and 5 and said at [12]-[13]:

"Section 5(3) defines the Court's discretion. The Court's discretion, with respect to the present application to grant leave, is shaped by two considerations. First, the application must be brought pursuant to s 4. Secondly, consideration, if relevant, must be given to s 5(4), that is, "*leave must be refused if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law*".

Section 4(1) of the Act may be divided into four elements:

- (1) An entity must exist, namely, the relevant insurer ("the insurer");
- (2) The insurer has issued an insurance policy with the relevant defendant, namely, Colocono Pty Ltd ("the policy");
- (3) The policy covers the risk; and
- (4) The policy was in place at the time of the risk."

33. *Murphy, McCarthy & Associates Pty Limited v Zurich Australian Insurance Limited* [2018] NSWSC 627 related to a claim by a plaintiff (MMA) against a bankrupt defendant (CFC) in circumstances where the plaintiff sought to proceed against the defendant's insurer under the Third Party Claims Act. Justice Hammerschlag at [16] expanded on the matters relevant to the grant of leave in s 5 (assuming the threshold requirements of s 4 are satisfied):

"MMA must have an arguable case against CFC, there must be an arguable case that the Policy responds to it and there must be a real possibility that if judgment is obtained CFC would not be able to meet it; *Opes Prime Stockbroking Ltd (in liq) (Scheme Administrators Appointed) v Stevens* [2014] NSWSC 659; *Oswald v Bailey* (1987) 11 NSWLR 715; *Tzaidas v Child* [2004] NSWCA 252; (2004) 61 NSWLR 18; *Bede Polding*

*College v Limit (No 3) Ltd* [2008] NSWSC 887. A residual discretion to refuse leave remains even if these requirements are met; *DSHE Holdings Ltd (receivers and managers appointed) (in liq) v Abboud* [2017] NSWSC 579.”

34. The reference to decisions pre-dating the commencement of the Third Party Claims Act reflects the intention of the NSW Law Reform Commission that “*the court’s general discretion to grant leave will continue to be exercised under these proposed provisions in the same way that it is exercised under the existing s 6.*”<sup>55</sup>
35. The “arguable case” in relation to insurance coverage is the threshold requirement for the prospective plaintiff. Under the prior regime, an insurer was required to do more than merely establish an arguable case that it was entitled to disclaim liability to avoid a grant of leave (*Manettas v Underwriters at Lloyds* (1993) 7 ANZ Insurance Cases 61-180 at 78,029). The principle is now given statutory weight by the terms of s 5(4) of the Third Party Claims Act, “*if the insurer can establish that it is entitled to disclaim liability*”.
36. An application for leave is not a “mini-trial”. Neither the substantive claim nor the insurer’s right to refuse cover are determined (*Dixon v Royal Insurance Australia Ltd* (1998) 90 FCR 390; *Leighton Contractors Pty Ltd v AMP General Insurance Ltd* [2003] NSWSC 839).

## D.2. Construing the Policy

37. The general principles of contractual interpretation are well known and do not require setting out. However, there are a number of discrete matters to emphasise.
38. As a species of commercial contract, an insurance policy must be interpreted to give to the words used their ordinary and fair meaning (*Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 520-521, 525)
39. A heading to a clause in a contract may be taken into account in construing the clause but cannot override clear words (*Mindshare Communications Ltd v Orleans Investments* [2007] NSWSC 1352 at [119], affirmed (2009) 254 ALR 81).
40. Where a contract includes general words following particular or specific words, the general words should be confined to things of the same kind as those specified (*Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629 at 639 (Starke J); *Lambourn v McLennan* [1903] 2 Ch 268 at 275-6 (Vaughan Williams LJ)). The *ejusdem generis* principle is a guide rather than a mechanical rule of reasoning (*Cody v JH Nelson Pty Ltd* at 649 (Dixon J)). The nature of the “genus” can be determined by considering (*Stag Line Ltd v Foscolo Mango & Co Ltd* [1931] 2 KB 48 at 67):

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<sup>55</sup> NSWLRC 143, [4.25].

“whether the specified things which precede the general words can be placed under some common category. By this [it is meant] that the specified things must possess some common and dominant feature.”

41. Doubt about the meaning of words in a contract of guarantee or indemnity is to be resolved against the person who put them forward (*Andar Transport Pty Limited v Brambles Ltd* (2004) 217 CLR 424 at 433-437). The choice is limited to those meanings that are fairly open by reason of the application of other rules of construction (*Rava v Logan Wines* [2007] NSWCA 62 at [56] (Campbell JA)). *Contra proferentem* has a more important role to play in relation to contracts of insurance (*Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 275 [19]):

“it is not unreasonable for an insured to contend that, if the insurer proffers a document which is ambiguous, it and not the insured should bear the consequences of the ambiguity because the insurer is usually in the superior position to add a word or a clause clarifying the promise of insurance which it is offering”

42. Exclusion clauses in particular are construed strictly against the insurer (*Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522).

#### **E. LEAVE OUGHT TO BE GRANTED**

43. There are two requirements to a grant of leave in respect of the Leave Motion. The *first* requires consideration of whether the Leave Motion is a valid application by meeting the threshold or characterisation requirements of s 4(1) of the Third Party Claims Act. The *second* is whether the Court ought in its discretion grant leave to the Plaintiff to proceed against CGU under s 5.

##### **E.1. Section 4(1) threshold requirements**

44. For the purposes of the Leave Motion, Advanced has a contingent liability to the Plaintiff and group members for property damage and personal injury caused by the negligence of its employees or a person working under the direction of its employees. The liability crystallised as contingent (in the sense of not being merely a remote possibility of loss) upon the filing of the Plaintiff’s statement of claim. Accordingly, the Plaintiff in her representative capacity is a “claimant” in the relevant sense.
45. In considering the threshold or characterisation requirement (as opposed to the question of leave), it is appropriate to take the liability alleged by the claimant at face value in determining whether the insured is entitled to be indemnified in respect of it. Having regard to the claims set out in the statement of claim and summarised at paragraphs 7 and 8 above, the threshold requirement of there being an insured liability is met.

46. The Policy covered Advanced for “Injury” to any person and “Property Damage” (neither definition relevantly limiting cover):
- 46.1 occurring within the Geographical Limits, which includes Australia;
  - 46.2 during the Period of Insurance, which includes 17 February 2017;
  - 46.3 as a result of an “Occurrence”, which includes an event of personal injury or property damage caused by negligence (“*neither expected nor intending from the standpoint of the Insured*”); and
  - 46.4 happening in connection with the Insured’s “Business”, which includes “*private work undertaken by the Insured’s Employees for any director...of the Insured*”.
47. In relation to the final point, Mr Orford was an employee of Advanced. It appears that Mr Elliot was either an apprentice (also an “Employee” under the Policy) or at least that he performed the act that caused the fire at the direct instruction of Mr Orford.
48. In the Plaintiff’s submission, the Leave Motion is a valid application under s 4(1) of the Third Party Liability Act and the elements of that subsection are satisfied.

## **E.2. Discretion to grant leave**

49. Having satisfied the requirements of s 4(1), the Plaintiff submits she ought to be granted leave to proceed against CGU because:
- 49.1 she has an arguable case against Advanced;
  - 49.2 there is an arguable case that the Policy responds to that liability; and
  - 49.3 it is certain that if judgment is obtained Advanced would be unable to meet it.

### *E.2.1. Arguable case against Advanced*

50. *First*, the Plaintiff has an arguable case against Advanced. Advanced admits by its defence that Mr Orford was its employee; that he was operating a quick cut on 17 February 2017; that it knew the quick cut produced sparks; and that a fire commenced at the Property on that day (paragraph 9 above). The only real question on the pleadings is whether the operation of the quick cut was negligent. The Plaintiff and CGU (based upon the Welding Ground) are as one in alleging that Advanced failed to “*have in place adequate fire suppression systems and equipment to control and suppress the fire.*”<sup>56</sup> Accordingly, on the pleadings, there ought to be no controversy

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<sup>56</sup> BFP-1, p 27 [17(d)].

between the Plaintiff and CGU that the Plaintiff has an arguable case against Advanced in negligence.

51. It is also necessary to consider the records of interview summarised at paragraphs 11 to 15 above. It may be fairly said that the defence does not fully reflect the version of events eventually described by Mr Orford and Mr Elliot. In summary, Mr Elliot, under the express direction of Mr Orford, operated the quick cut in such a way as to direct sparks into nearby vegetation. A fire commenced immediately afterwards. It would be open to the Court in considering the Leave Motion to infer that there is a real possibility that the version of events described by Mr Orford and Mr Elliot may be established at trial. If so, the negligence case is overwhelming.

*E.2.2. Arguable case that the policy responds*

52. *Second*, there is an arguable case that the Policy responds to the liability for personal injury and property damage alleged against Advanced. As set out above at paragraph 45, that risk is one covered by the insuring clause 1.1 of the Policy.
53. CGU has purported to deny cover on two bases. Whether the Plaintiff has an arguable case in relation to the Business Ground and Welding Ground is a critical matter for the discretion to grant leave and the mandatory terms of s 5(4).
54. The Business Ground is that CGU is entitled to avoid liability because the cutting of steel with the quick cut was not in connection with the "Business" because it was:
- 54.1 private work for Mr Hooper; and
- 54.2 not related to plumbing work.
55. As summarised at paragraph 22, "Business" is defined in clause 4.4 of the Policy Wording to mean the Business specified in the Schedule (being, "*Principally: Plumbing and any other activities incidental thereto*") and a number of other activities, including "*private work undertaken by the Insured's Employees for any director...of the Insured*" (cl 4.4.5).
56. The Business Ground must fail for two reasons. *First*, private work for Mr Hooper, the director of Advanced, comes within the definition of the Business in the Policy. There is no reason to read down the matters listed in cll 4.4.2 to 4.4.10 as there are no words of limitation and they relate to diverse activities (including tours and first aid). *Second*, if the Court does not regard that as a complete answer, the evidence relied upon by CGU in relation to the nature of the work is comprised of police interviews and statements involving questions and answers. There is no basis to exclude the reasonable possibility that the works at the Property included plumbing related works

(such as laying foundation for pipes) so that it could not be described as “*any other activities incidental thereto*”.

57. The Welding Ground is that CGU is entitled to avoid liability because the Welding Endorsement applies and that the cutting had not been in strict compliance with AS 1674.1. The Welding Endorsement applies to:

“liability arising out of or in any way connected with any arc or flame cutting, flame heating, arc or gas welding, electric, oxy-acetylene, laser cutting and/or spark producing equipment by or on behalf of the Insured or similar operation in which welding equipment is used”

58. The Plaintiff’s contention is that the specific terms used in the Welding Endorsement relate to a genus to which cutting using a quick cutter does not belong and accordingly the general expression “*spark producing equipment*” does not on its true construction include cutting using a quick cutter.

59. Mr Rankin is an experienced teacher at TAFE in Engineering, including welding certification, and an Australian Welding Institute Welding Supervisor. The processes expressly set out in the Welding Endorsement and their features are identified by Mr Rankin as follows:

59.1 Arc cutting is the application of heat to a metal product by means of an electric arc until the metal becomes molten. Molten metal is blown away by the pressure of the arc or compressed air to create the cut.<sup>57</sup>

59.2 Flame cutting is the application of heat to a metal product by means of a flame until the metal reaches ignition temperature at which point high pressure oxygen is applied. Molten metal is blown away by pressurised oxygen to create the cut.<sup>58</sup>

59.3 Flame heating is the application of heat to a metal product by means of a flame until the metal becomes pliable. Generally, sparks are not produced.<sup>59</sup>

59.4 Arc welding is the application of heat to a metal product by means of an electric arc to facilitate a weld. Arc welding produces molten spatter that can be expelled indiscriminately.<sup>60</sup>

59.5 Gas welding is the application of heat to a metal product by means of a flame to facilitate a weld. Gas welding produces minimal spatter.<sup>61</sup>

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<sup>57</sup> Rankin Report, a).

<sup>58</sup> Rankin Report, b).

<sup>59</sup> Rankin Report, c).

<sup>60</sup> Rankin Report, d).

<sup>61</sup> Rankin Report, e).

- 59.6 Electric cutting is equivalent to arc cutting.<sup>62</sup>
- 59.7 Oxy-acetylene cutting is flame cutting using a gas mix of oxygen and acetylene.<sup>63</sup>
- 59.8 Laser cutting is the use of a directed beam of energy to cut materials.<sup>64</sup>
- 59.9 Electric welding is equivalent to arc welding.<sup>65</sup>
60. Mr Rankin observes that each of the processes involves the direct application of heat to metal to shape, cut or weld. By contrast, the operation of a Husqvarna K 970 power cutter involves the application of friction to create a cut.<sup>66</sup>
61. In the Plaintiff's submission, the dominant theme of the processes specified in the Welding Endorsement is the direct generation and subsequent application of heat. The general expression "*spark producing equipment*" ought to be construed in accordance with the genus of the processes described above. This construction is reinforced by the later words, "*...or similar operation in which welding equipment is used*", which emphasise that the exclusion is not directed to all "spark producing" activities but to welding and similar activities. This is consistent with the general principle that general words are to be understood in the same sense as the words that surround them and not to be given a meaning that is inconsistent or renders them irrelevant (*Lend Lease Real Estate Investments Ltd v GPT Re Ltd* [2006] NSWCA 207, [13] (Spigelman CJ))
62. It is at least arguable that the operation of the Husqvarna K 970 power cutter, which does not involve the application of heat to weld or cut, does not fall within the Welding Endorsement.
63. There are other indications that the Plaintiff's construction is correct. In AS 1674.1 "hot work", is defined to mean "*grinding, welding, thermal or oxygen cutting or heating, and other related heat-producing or spark-producing operations*". This definition is materially different from the terms of the Welding Endorsement. If CGU had intended that the Welding Endorsement correspond to all processes falling within AS 1674.1, it was open to it to refer to "hot work" within the meaning of AS 1674.1, or at least to specifically refer to "grinding" as AS 1674.1 does. It may be reasonably inferred that CGU was aware of the terms of AS 1674.1 because it is expressly referred to. The absence of corresponding language in the Welding Endorsement ought to be taken as a deliberate omission in accordance with conventional principles of construction, including the strict construction of exclusion clauses. Neither of the other standards

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<sup>62</sup> Rankin Report, f).

<sup>63</sup> Rankin Report, g).

<sup>64</sup> Rankin Report, h).

<sup>65</sup> Rankin Report, i).

<sup>66</sup> Rankin Report, j).

referred to in the Welding Endorsement assist CGU as they refer to electrical and laser safety. Rather, they reinforce an interpretation of the clause as being confined to the genus of those things specifically identified. Finally, this reading accords with the use of “Welding Endorsement” as a header for the exclusion. The limitation on the interpretative use of headings (cl 5.1) does not self-evidently extend to the Schedule (cl 4.20). In any event, the “convenience” to which this language is directed is that of the reader, who would understand at a glance the clause to relate to welding processes, not grinding or friction cutting.

64. Accordingly, for the reasons set out above:

64.1 there is an arguable case that the Policy responds to the liability for personal injury and property damage alleged by the Plaintiff against Advanced; and

64.2 CGU has not satisfied the requirements of s 5(4) so as to exclude the Court’s discretion to grant leave to proceed.

*E.2.3. Advanced cannot satisfy any judgment debt*

65. *Third*, it is certain that if judgment is obtained Advanced would be unable to meet it. The Initial Advice to Creditors indicates that Advanced has assets of \$17,416.22.<sup>67</sup>

## F. CONCLUSION

66. For the forgoing reasons, the Court in its discretion ought to grant the Plaintiff the relief set out in prayer 1 of the Leave Motion.

6 August 2018

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<sup>67</sup> BFP-1, p 76.

**Ritchie v Advanced Plumbing and Drains Pty Ltd (2017/126664)**

Outline of submission in support of motion to proceed against Insurance Australia Limited

**Index to exhibits BFP-1 and KAE-1**

<b>Document</b>	<b>Date</b>	<b>Affidavit, page</b>
CGU Public Liability Insurance policy and policy schedule	July 2013	KAE-1, p.12 - 34
Statement of Claim	28 April 2017	BFP-1, p.20 - 35
Defence	1 September 2017	BFP-1, p.36 - 45
Transcript of criminal proceedings for Harrison Elliot and Shannon Orford	15 December 2017	BFP-1, p.49 - 59
Initial Advice to Creditors	3 January 2018	BFP-1, p.71 - 107
ASIC current and historical organisation extract for Advanced Plumbing & Drains Pty Ltd	24 January 2018	BFP-1, p.8 - 18
Australian Standard AS 1674.1 – 1997: Safety in welding and allied processes, Part 1: fire precautions	15 February 2018	KAE-1, p.35 - 63
Australian Standard AS 1674.2 – 2007: Safety in welding and allied processes, Part 2: electrical	15 February 2018	KAE-1, p.64 - 108
Correspondence from CGU declining to indemnify Advanced Plumbing and Drains Pty Ltd	16 March 2018	KAE-1, p.114 - 116